

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment)	WC Docket No. 17-84
by Removing Barriers to Infrastructure)	
Investment)	

**COMMENTS OF THE AMERICAN CABLE ASSOCIATION
ON THE FURTHER NOTICE OF PROPOSED RULEMAKING**



I. INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”)¹ hereby provides comments in response to the Further Notice of Proposed Rulemaking (“*FNPRM*”) issued by the Federal Communications Commission (“Commission”) on removing barriers to wireline broadband deployment and specifically on whether to codify its “longstanding precedent” that promotes “the use of overloading to maximize the useable space on utility poles.”² For decades, the Commission has determined that overloading does not require a pole attachment application or a utility’s permission or consent, and that overloading consistent with generally accepted engineering practices should not incur any additional charge. These decisions have enabled cable

¹ ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served. Many of these providers offer service in rural communities and more remote areas.

² *Accelerating Wireline Broadband by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 17-154, at paras. 160-162 (2017) (“*FNPRM*”). For purposes of these comments, the term “overloading” refers to affixing fiber or other cable or related equipment, including wireless equipment, to existing cable attached to poles.

operators and other broadband providers to expeditiously add capacity to their networks to deliver the high-performance services consumers demand.³ But despite this longstanding precedent, ACA members and other service providers report that some utilities require full attachment applications or impose other requirements that delay or stymie overloading entirely. Therefore, to help address this problem, the Commission should codify existing law that permits an attachor or third party to overload, consistent with generally accepted engineering practices, without needing to obtain utility approvals or pay additional charges. By adopting clear overloading rules, the Commission will ensure overloaders receive timely and cost-effective pole access, spurring broadband deployment.

II. THE COMMISSION SHOULD CODIFY EXISTING LAW PERMITTING OVERLOADING WITHOUT NEEDING UTILITY APPROVALS OR PAYING ADDITIONAL CHARGES

The Commission recognized in the *FNPRM* that “[f]or decades, the Commission has maintained a policy of encouraging the use of overloading to maximize the useable space on utility poles.”⁴ The benefits of this policy are clear and quantifiable, serving as the “foundation for billions of dollars in facilities deployment.”⁵ But, despite longstanding, unambiguous precedent, utilities continue to require overloaders to file applications or meet other

³ See Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, at 9-10, 30-31 (June 15, 2017) (“ACA NPRM Comments”); Reply Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, at 7-10 (July 17, 2017) (“ACA NPRM Reply Comments”); Ex Parte Filing of the American Cable Association on Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, at 1-2 (Nov. 6, 2017) (“ACA Nov. 6, 2017 Ex Parte”); Ex Parte Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment, WC Docket No. 17-84, at 2 (Aug. 3, 2017) (“ACA Aug. 3, 2017 Ex Parte”).

⁴ *FNPRM* at para. 160. See *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, 6806, para. 60 (1998) (“Overloading capability continues to be a facet of a pro-competitive market because it maximizes the usable capacity on a pole”) (“1998 Pole Attachment Order”).

⁵ Ex Parte Filing of NCTA – The Internet & Television Association, WC Docket Nos. 17-84, 14-130, at 2 (Nov. 8, 2017); Ex Parte Filing of NCTA – The Internet & Television Association, WC Docket No. 17-84, at 2 (Oct. 20, 2017).

requirements, and pay unwarranted fees that slow or thwart overlashing. Thus, the Commission should intervene to stop utilities from engaging in these practices that run counter to the public interest, harming broadband deployment and reducing competition.

A. The Law is Clear that Overlashing is not Subject to Application Requirements, Prior Utility Approvals, or Unrelated or Otherwise Unwarranted Charges

Longstanding Commission precedent demonstrates that overlashing does not require pole attachment applications, prior utility approvals, or payment of unrelated or otherwise unwarranted charges. The concern that some utilities would misuse their control over poles to impose unreasonable conditions on overlashing is not new. The Commission recognized as far back as 1995 “that utility pole owners may be unreasonably preventing cable operators from ‘overlashing’ fiber to their existing lines.”⁶ Not only did utilities deny overlashing requests for no reason, they also failed to process requests within reasonable timeframes.⁷ The Commission warned utilities that preventing overlashing to “essential facilities” like poles resulted in “serious anticompetitive effects,” and encouraged overlashers to bring unreasonable utility practices to its attention.⁸

In 1998, the Commission again emphasized the “serious anti-competitive effects of preventing cable operators from adding fiber to their systems by overlashing” and stated that “improper constraints were being placed on cable systems that sought to overlash.”⁹ The Commission dismissed utility arguments that overlashing imposed a dangerous “unsupervised burden” on poles, requiring prior utility review and approval.¹⁰ The Commission noted that “[o]verlashing has been in practice for many years” without detrimentally impacting pole safety

⁶ *Common Carrier Bureau Cautions Owners of Utility Poles*, Public Notice, DA 95-35, at 1 (CCB 1995).

⁷ *Id.*

⁸ *Id.* at 1-2

⁹ *1998 Pole Attachment Order*, 13 FCC Rcd at 6806, para. 60.

¹⁰ *Id.* at 6807, para. 63.

and cited reports that utilities only began interfering with overloading after they started competing with broadband providers for customers.¹¹ The Commission found that overloading to existing facilities did not represent an expansion of a utility pole owner's obligation to provide for attachments and that third-party overloading normally did not add any more burden to the pole than a service provider overloading to its own facilities.¹² The Commission stated that "compliance with generally accepted engineering practices" would ensure that overloading did not significantly increase the burden on poles.¹³ The Commission further found that overloading that did not significantly increase the burden on poles "should be permitted without additional charge."¹⁴

The Commission similarly declined to impose restrictions on overloading in 2001, specifically for third-party overloading.¹⁵ The Commission acknowledged that third-party overloading must follow the same safety, reliability, and engineering constraints applicable to overloading by the host pole attachments.¹⁶ Thus, to the extent the placement of overloaded equipment to existing facilities could overload a pole, the attacher must pay the necessary make-ready charges to strengthen the pole.¹⁷ But the Commission found that, in general, third-party overloading did not increase the amount of pole space occupied by existing facilities and

¹¹ *Id.* at 6807-08, paras. 63-64.

¹² *Id.* at 6808-09, paras. 64, 68.

¹³ *Id.* at 6807-08, para. 64.

¹⁴ *Id.* at 6807, para. 64. The Commission deferred making a decision on the effect any significant burden on the pole from overloading may have on the amount charged by the utility pole owner. *Id.* at 6819, para. 92.

¹⁵ See *Amendment of Commission's Rules and Policies Governing Pole Attachments, Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001).

¹⁶ *Id.* at 12141, para. 75. It also said that utilities had the right to know who overloaded to their poles. *Id.* at 12144, para. 82.

¹⁷ *Id.* at 12142, paras. 76-77. The Commission noted that such make-ready charges "are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the [pole attachment] rate calculation." *Id.* at 12142-43, para. 77.

“did not disadvantage the utility’s ability to ensure the integrity of its poles.”¹⁸ The Commission therefore affirmed its policy “that neither the host attaching entity nor the third party overlasher *must obtain additional approval from or consent of the utility* for overlashing other than the approval obtained for the host attachment.”¹⁹ In other words, an overlasher does not need to file an attachment application, obtain utility approval, or pay unrelated or otherwise unwarranted charges before overlashing to existing facilities already approved by the utility. The D.C. Circuit subsequently upheld the Commission’s overlashing policy, finding it showed “due consideration for the utilities’ statutory rights and financial concerns” while properly balancing these concerns “with the efficiency gains that overlashing brings to the industry.”²⁰ The court further stated that “[o]verlashers are not required to give prior notice to utilities before overlashing,” although utilities could negotiate with overlashers to provide such notice by agreement.²¹

When faced with utilities erecting barriers to overlashing, the Commission has not hesitated to intervene.²² For example, the Commission granted a complaint in 2003 from a cable operator challenging a contractual provision requiring a utility’s prior written consent for overlashing and allowing the utility to take up to 30 days to grant or deny an overlashing request.²³ The Commission found this provision “unjust and unreasonable on its face” and directed the utility to allow overlashing consistent with Commission precedent.²⁴

¹⁸ *Id.* at 12141, 12143, paras. 74, 78.

¹⁹ *Id.* at 12141, para. 75 (emphasis added).

²⁰ *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

²¹ *Id.* See 1998 *Pole Attachment Order*, 13 FCC Rcd at 6808, para. 66 (“[I]t is current practice for cable operators routinely to overlash their existing attachments without specific prior notification to the pole owners outside of provisions for major modification contained in their pole attachment agreements.”).

²² See Comments of NCTA – The Internet & Television Association, WC Docket No. 17-84, WT Docket No. 17-79, at 5 (June 15, 2017) (stating the Commission has “wisely intervened against utility companies in the past to ensure that cable operators could overlash to existing strand without a permit or other interference from the pole owner”) (“NCTA NPRM Comments”).

²³ *The Cable Television Ass’n of Ga. v. Ga. Power Co.*, File No. PA 01-002, Order, 18 FCC Rcd 1633, 16340-41, para. 13 (EB 2003).

²⁴ *Id.*

For over twenty years, the Commission's position on overloading has been clear: cable operators and telecommunications service providers are not required to file an attachment application, receive prior utility approval or consent, or pay unrelated or otherwise unwarranted charges before overloading to existing facilities. As a result, the Commission's proposal in the *FNPRM* to adopt clear overloading rules represents the codification of longstanding precedent.

B. Utilities Continue to Impose Application Requirements and Conditions on Overloading

Although the Commission has consistently found that overloading does not require a pole attachment application or other prior approval or consent, some utilities continue to impose application requirements and other conditions on overloading. These actions harm ACA members and other providers by impeding network deployments, upgrades, and repairs.²⁵ The list of unlawful utility actions is long and varied. For example, one ACA member in Iowa reported that a utility in its territory requires all overloading projects to go through the full pole attachment application process, regardless of size or complexity.²⁶ Another ACA member remarked that not only is it required to go through the full application process before overloading, it then must pay the utility fees as high as \$1,000 per pole after completing the project.²⁷ There is no indication that such fees related to necessary make-ready work or the correction of safety violations related to the overloading.²⁸ ACA members noted that some utilities permit overloading without an application, but only up to an arbitrary number of spans

²⁵ ACA NPRM Comments at 10; ACA NPRM Reply Comments at 8; ACA Nov. 6, 2017 Ex Parte at 2; Ex Parte Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, at 3-4 (Sep. 14, 2017) ("ACA Sep. 14, 2017 Ex Parte"); NCTA NPRM Comments at 5-7; Reply Comments of NCTA – The Internet & Television Association, WC Docket No. 17-84, WT Docket No. 17-79, at 3-4 (July 17, 2017) ("NCTA NPRM Reply Comments").

²⁶ ACA NPRM Comments at 10.

²⁷ *Id.*

²⁸ See ACA NPRM Comments at 21-23 (discussing utility attempts to charge service providers fees unrelated to their attachments); ACA NPRM Reply Comments at 28-33 (same).

(e.g., ten).²⁹ For larger projects, the overlasher must undergo the full application process, which delays deployments by 30 to 45 days.³⁰ In another variation, some utilities forced providers to apply for permits and pay associated fees after completing overlashings, even when they did not impose application requirements or pre-project charges.³¹ These unlawful requirements effectively acted as a tax on ACA members, diverting resources from funding deployments to satisfying utility demands.³² By codifying existing law, the Commission will make clear to utilities that the application requirements, consent obligations, and unrelated or otherwise unwarranted charges faced by ACA's members are impermissible.

Utility commenters argued that application requirements and other conditions are necessary because overlashing places additional burdens on poles, increasing the likelihood that they will fail and require replacement.³³ The utilities alleged that overlashing may cause cables to sag below clearance standards³⁴ or exacerbate preexisting safety violations.³⁵ The utilities thus argued that "overlashing must be subject to utility review through the application process."³⁶

²⁹ ACA Sep. 14, 2017 Ex Parte at 3 (discussing the overlashing barriers faced by MetroCast).

³⁰ *Id.* One ACA member claimed that such requirements delayed the overlashing of strand-mounted Wi-Fi hotspots, impeding broadband deployment in underserved areas. *Id.* at 3 n.4.

³¹ *Id.* at 3.

³² ACA NPRM Reply Comments at 30.

³³ Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84, at 15-16 (June 15, 2017) ("CCU NPRM Comments"). See Reply Comments of the Utilities Technology Council, WC Docket No. 17-84, at 14-16 (July 17, 2017) (asserting that ACA's overlashing proposals threaten pole safety and reliability).

³⁴ CCU NPRM Comments at 16. See Ex Parte Notice of Union Electric Company d/b/a Ameren Missouri and Oncor Electric Delivery Company LLC, WC Docket No. 17-84, at 2 (Nov. 9, 2017) (stating that a utility must assess whether the additional load on a pole resulting from overlashing meets its safety standards) ("Ameren/Oncor Ex Parte").

³⁵ Reply Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84, at 30 (July 17, 2017) ("CCU NPRM Reply Comments"); Ameren/Oncor Ex Parte at 2.

³⁶ CCU NPRM Reply Comments at 29. ACA notes that some utility commenters focused their concerns on wireless overlashing. See *id.* at 30 (discussing potential safety issues presented by mounting wireless antennas to poles); Ameren/Oncor Ex Parte at 2 (providing example of safety concerns with overlashed wireless equipment). By contrast, wireline overlashing of cable and other equipment can be installed

The utility commenters are wrong. As explained above, utility claims that overloading detrimentally impacts pole safety and reliability have been repeatedly considered and rejected by the Commission over the past twenty years. Cable operators and telecommunications providers have safely overlashed fiber and advanced communications equipment to existing facilities for decades without overloading poles.³⁷ Overlashers are well aware they need to comply with generally accepted engineering practices to safeguard pole safety and reliability, and they have done so.³⁸

The suggestion made by some utilities that overlashers disregard safety standards ignores the realities of the pole attachment process. Because overlashers already have facilities installed on utility poles, “they have the same interest in maintaining safe and reliable outside plant, networks and support structures as the utilities.”³⁹ In addition, overlashers commonly must indemnify utilities under their pole attachment agreements for corrections or damages resulting from their work.⁴⁰ Consequently, public safety and utility property rights remain protected throughout the overloading process. ACA therefore supports the Commission’s conclusion that the utility commenters in this proceeding do not “offer[] a reason for us to disturb our long-held precedent” permitting overloading without a pole attachment application, prior utility approval, or unrelated or otherwise unwarranted charges.⁴¹

“without meaningfully adding to the physical burdens on aerial plant.” Comments of Charter Communications, Inc., WT Docket No. 17-79, WC Docket No. 17-84, at 34 (June 15, 2017). See NCTA NPRM Comments at 6 (“[C]able operators overlashed fiber and upgraded amplifiers to house optical nodes without incident.”).

³⁷ ACA NPRM Comments at 30; NCTA NPRM Comments at 5; NCTA NPRM Reply Comments at 3-4.

³⁸ As stated above, the validity of utilities’ safety concerns, if any, lies with the installation of large wireless equipment on existing facilities, not the minimal burden created by wireline overloading. See *supra* note 36.

³⁹ NCTA NPRM Comments at 6. See ACA NPRM Reply Comments at 9 (stating overlashers and utilities “have a shared interest in the safety and reliability of outside plant”).

⁴⁰ ACA NPRM Reply Comments at 9; NCTA NPRM Comments at 6.

⁴¹ *FNPRM* at para. 162 n.509.

C. The Commission Should Codify its Rule Permitting Overlashing without Application Requirements, Prior Utility Approvals, or Unrelated or Otherwise Unwarranted Charges

With utilities continuing to impose unlawful pole attachment application and other conditions on overlashing, it is clear that Commission precedent alone is not enough to protect overlasher rights and spur broadband deployment. As Chairman Pai observed at the outset of this proceeding, “[w]ithout rules that keep costs low and encourage deployment,” small and mid-sized broadband service providers like ACA’s members “won’t get off the ground—and consumers will never benefit from the competition they’re trying to bring to the broadband marketplace.”⁴² The Commission recognized the benefits of codifying existing law in the *FNPRM*, noting that adopting clear rules “will enhance the deployment of broadband services and should improve compliance with long-standing precedent by providing additional clarity in the text of our rules.”⁴³ The codification of overlashing precedent furthers the Commission’s goals in the *FNPRM* to “make clear the rights of overlashers . . . [and] reduce any confusion that may delay attachers from deploying next-generation services to unserved communities.”⁴⁴ A key way to facilitate deployment is to avoid the application process for builds where long-term experience demonstrates there are significant benefits to expeditious access, minimal opportunities to harm safety and reliability, and ready and well-known measures to audit work and correct issues.⁴⁵ Overlashing to existing facilities clearly fits these criteria and the

⁴² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3327 (Statement of Chairman Ajit Pai).

⁴³ *FNPRM* at para. 8 (discussing codification of existing precedent excluding capital costs recovered via make-ready fees from pole attachment rates). See *id.* at 114 (Statement of Commissioner Brendan Carr) (remarking that codification of existing law “help[s] drive fiber deployments deeper into the network without the need for costly and time-consuming regulatory approvals”); *id.* at 115 (Statement of Commissioner Jessica Rosenworcel) (noting the clarity that codification provides).

⁴⁴ *Id.* at para. 162.

⁴⁵ ACA Aug. 3, 2017 Ex Parte at 2.

Commission should codify existing law permitting overlashing without application requirements, prior utility approvals, or unrelated or otherwise unwarranted charges.

III. CONCLUSION

For the foregoing reasons, ACA recommends that the Commission codify longstanding precedent permitting overlashing without an attachment application, prior utility approval, or unrelated or otherwise unwarranted charges.

Respectfully submitted,

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